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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1637

THE MAGNAVOX COMPANY OF TENNESSEE,

Petitioner

versus

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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The Petitioner herein respectfully moves this Court for an Order clarifying the decision in this case rendered on February 27, 1974. In support of this Motion, Petitioner states the following:

REASONS FOR GRANTING THE PETITION

In its Opinion on February 27, 1974 this Court, Justice Douglas delivering the Opinion of the Court, held that the Company's contractual prohibition of distribution of literature on Company property might interfere with the employees' rights under Section 7 of the National Labor Relations Act "to form, join, or assist labor organizations," or to refrain from such activities, and such rights, unlike those in the economic

area, cannot be waived by the employees' collective bargaining representative.

In so ruling, the Court stated that:

> The Union may, of course, reach an agreement as to wages and other employment benefits and waive the right to strike during the time of the agreement as the *quid pro quo* for the employer's acceptance of the grievance and arbitration procedure. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455. Such agreements, however, rest on "the premises of fair representation" and presuppose that the selection of the bargaining representative "remains free." *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 289. In that case we held that the waiver of the "right to strike" did not embrace a waiver of the right to strike "against unlawful practices destructive of the foundation on which collective bargaining must rest." *Id.*, at 281. *We dealt there with rights in the economic area. Yet as the Fifth Circuit held in the Mid-States case a different rule should obtain where the rights of the employees to exercise their choice of a bargaining representative is involved—whether to have no bargaining representative, or to retain the present one, or to obtain a new one. When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative.* (p. 3). (Emphasis added)

By the language emphasized above, it appears that the Court is ruling that a company and a union are permitted to waive any right to distribute literature on company property, except when that literature involves the employees' wish "to have no bargaining representative, or to retain the present one, or to obtain a new one." In fact, the concurring and dissenting opinion presumes as such:

> The Board held, and I presume the Court agreed, that the Union could waive any right that the employees might have to distribute Union institutional literature. The only question in this case relates to the waivability of rights to distribute literature *regarding the proposed selection, retention, or displacement of the collective-bargaining agent.* (fn. p. 3) (Emphasis added)

However, the Order of the National Labor Relations Board which becomes operative as a result of the reversal of the Sixth Circuit decision prohibits union waiver of distribution rights of employees of all literature—even that which is, like the right to strike, concerned solely with matters economic in nature.[1]

The Board's Order states that the Company should:

> Cease and desist from maintaining, giving effect to, or enforcing any rule which prohibits employees from distributing literature in nonworking areas on nonworking time on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees in a unit appropriate for collective bargaining, *or other matters related to the exercise by employees of their Section 7 rights.* (Emphasis added)[2]

Thus the Board's Order appears to be in direct conflict with the decision of this Court. In fact, it should be noted that the Board's Order in this case goes far beyond

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[1] Examples of such literature which the Board prohibits the union from waiving distribution of on company property would be notices of union meetings, announcements of arbitration awards or grievances filed, or handouts relating to the status of negotiations between the Company and the Union. Distribution of such literature, while an exercise of Section 7 rights, does not involve the question of fair representation versus self-interest of a union in perpetuating itself as the bargaining representative.

[2] Petition for Writ of Certiorari, at p. 25.

the remedy approved or sanctioned by any Court of Appeals presented with the question of union waivability of employee distribution rights.[3]

The lower court cases cited by the Court in its decision[4] involved literature pertaining to the "proposed selection, retention, or displacement of the collective-bargaining agent." The only Court of Appeals case, other than the instant case,[5] concerned with solicitation or distribution not dealing with "the proposed selection, retention, or displacement of the collective-bargaining agent" was *Mason & Hanger-Silas Mason Company* v. *National Labor Relations Board*, 405 F.2d 1 (5th Cir., 1968). In that case, the United States Court of Appeals for the Fifth Circuit distinguished its decision in *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702 (5th Cir., 1968), the case cited by this Court in its present decision. Accordingly, the Fifth Circuit allowed enforcement of the contractual prohibition. 405 F.2d 1, 5.

Because the distribution of literature in the instant case did not involve selection, rejection, retention or

[3] While the Board would permit waiver of distribution of "institutional" literature, this is a term so vague in definition as to be incapable of enforcement. Certainly, it would seem much more appropriate to determine waivability on the basis of whether the purpose of the literature involves choice of representative in the context of an attempt to retain or displace the incumbent bargaining agent.

[4] *International Association of Machinists and Aerospace Workers, District No. 9* v. *National Labor Relations Board*, 415 F.2d 113 (8th Cir., 1969); *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F.2d 702 (5th Cir., 1968). Although not cited by the Court, *Armco Steel Corporation* v. *National Labor Relations Board*, 344 F.2d 621 (6th Cir., 1965) and *National Labor Relations Board* v. *Gale Products, Division of Outboard Marine Corp.*, 337 F.2d 390 (7th Cir., 1964), involved distribution of the same type of literature.

[5] Appendix to the Briefs, pp. 33-35.

displacement of the bargaining representative, and because of the conflict between the Court's decision as interpreted from the above-cited language and the Board's Order, Petitioner is unclear as to what its legal responsibilities are under the decision of this Court as to distribution of literature the subject matter of which, while involving Section 7 rights, is, like the right to strike, economic in nature.[6]

It is Petitioner's position that waiver of employee rights to distribute literature which does not relate to choice of bargaining representative should be allowed since no legitimate question of fair representation by the Union would be raised by the waiver. Thus, Petitioner contends that the portion of the Board's order prohibiting waiver of distribution rights of employees of literature relating to matters other than selection or rejection of the bargaining agent should not be enforced, and that this Court should so order.

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[6] It is Petitioner's belief that distributions of economic literature such as grievance announcements or status of negotiation reports, are more prominent, probable and vastly more numerous in the day to day union activities of employees than distributions of literature dealing solely with the subject of selection, retention or displacement of the bargaining representative. Waivability of distribution of such economic literature is, therefore, a question of major significance in employer-union relations which should be recognized and answered by the Court in this case; particularly since the specific literature involved in the case was of the economic variety.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant a Rehearing of its decision rendered February 27, 1974 for the purpose of providing guidance to the parties as to whether or not a union can waive rights of employees to distribute literature the subject matter of which does not involve selection, retention, or displacement of the collective bargaining agent; but which, like the right to strike, concerns matters economic in nature.

Respectfully submitted this 22d day of March, 1974.

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CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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The Magnavox Company of
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